AIRMARTECH CORPORATION (M) SDN BHD

v.

EQUALTRA (M) SDN BHD

HIGH COURT MALAYA, MELAKA
KN SEGARA J
[CIVIL SUIT NO: 22-85-1999]
29 JANUARY 2001

CIVIL PROCEDURE: *Writ of summons - Indorsement - Indorsement of claim - Whether as prescribed by O. 6 r. 2(1) Rules of the High Court*

CIVIL PROCEDURE: *Service - Irregularity in service - Service not effected at registered office - Whether service can be effected at principal place of business - Rules of the High Court 1980, O. 62 r. 4(1)(b)*

CIVIL PROCEDURE: *Affidavits - Affidavit of service - Absence of title in jurat - Validity of affidavit*

The plaintiff obtained a judgment in default of appearance against the defendant. The defendant applied to set aside the said judgment but that was dismissed by the assistant registrar. The defendant now appealed on the grounds that: (1) the plaintiff's writ of summons was not indorsed with a statement of claim; (2) service was not effected at the defendant's registered office; and (3) the jurat to the plaintiff's affidavit of service did not have a title as required by O. 41 rr. 1(7) and (8) of the Rules of the High Court 1980 ('RHC').

Held:

[1] The plaintiff had issued a writ indorsed with a statement of claim as provided under O. 6 r. 2(1) RHC. The writ was indorsed with a detailed statement of claim setting out in numbered paragraphs the nature of the claim and relief sought. It followed, therefore, that the writ indorsed with the statement of claim was regularly issued. Deviations, if any, from that as provided in Form 2 of the RHC had not affected the substance or misled the defendant as to render the writ invalid.

[2] Failure of the jurat to bear the title is of very little significance or consequence as the jurat is not a separate document from the affidavit sworn. The jurat forms part of the affidavit and the affidavit is already intituled. In any event, s. 71 of the Interpretation Acts 1948 and 1967 provides that whenever forms are prescribed, slight deviations therefrom

not affecting the substance or calculated to mislead shall not invalidate them, save as expressly provided for. The RHC does not expressly invalidate non-compliance with any of its forms and in particular Form 78.

[3] The copy of the writ that was exhibited to the court showed that the defendant had acknowledged receipt of the writ by signing and affixing the seal of the defendant company. That was evidence of valid service on the defendant.

[4] In *Lee Boon Tatt & Ors v. Takhdir Trading Sdn Bhd*, it was held that it was not the legislative intention to limit service only at the registered office. Under O. 62 r. 4(1)(b), if there are more offices than one, then service may be effected at the principal office, *ie*, the principal place of business of the corporation.

[4a] The defendant was not obviously carrying on business at its registered office at the time of the service of the writ and neither was there the signage of the defendant company at that address. In the circumstances, service of the writ at the defendant's temporary office was regular, effective and valid.

[5] There were no good and cogent reasons advanced by the defendant for not filing a memorandum of appearance. The defendant's assertion that the employee of the defendant who had in fact received the writ had not brought the matter to the attention of the defendant almost a year after the service of the writ was unconvincing and was not a valid ground to set aside a judgment in default of appearance.

[Defendant's appeal dismissed with costs.]

Case(s) referred to:

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(refd)***

Lee Boon Tatt & Ors v. Takhdir Trading Sdn Bhd [1984] 2 MLJ 341 ***(foll)***

Pembinaan Masyuli Sdn Bhd v. Mow Seng Housing & Land Development Sdn Bhd [1998] 3 CLJ 575 ***(refd)***

Legislation referred to:

Interpretation Acts 1948 and 1967, s. 71

Rules of the High Court 1980, O. 6 r. 2(1), O. 18 rr. 1, 6(5), O. 41 rr. 1(7), (8)

For the plaintiff - YT Woon; M/s Zailan & Co

For the defendant - M/s Bashir & Co

Reported by Usha Thiagarajah

JUDGMENT

KN Segara J:

This is an appeal by the defendant against the decision of the timbalan pendaftar delivered on 2 November 2000 (encl. 39) dismissing the defendant's application (encl. 23) to set aside the judgment in default of appearance, the writ of seizure and sale together with the prohibitory order as well as the summons for directions (encl. 17)

The plaintiff had on 11 May 1999 issued a writ indorsed with a statement of claim (encl. 1) as provided under O. 6 r. 2(1) of the Rules of the High Court 1980 which reads:

> Before a writ is issued it must be indorsed:
>
> (a) with a statement of claim or, if the statement of claim is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby;
>
> (b) ...

In the instant appeal before me, this is exactly what the plaintiff has done. The plaintiff has indorsed on the writ a detailed statement of claim setting out in numbered paragraphs the nature of the claim and relief sought. Since the plaintiff has chosen to indorse on the writ a statement of claim he is not required to file and serve a statement of claim on the defendant – see O. 18 r. 1 Rules of the High Court which reads:

> **Unless** the Court gives leave to the contrary or **a statement of claim is indorsed on the writ**, the plaintiff must serve a statement of claim on the defendant or ... (emphasis provided)

The plaintiff's statement of claim indorsed on the writ is reproduced in toto hereunder, for ease of comprehension:

PERNYATAAN TUNTUTAN

1. Pada atau berhampiran dengan 20 Januari 1997, Plaintif dan Defendan telah mengikat ke dalam satu perjanjian yang bertajuk "Sale And Purchase Agreement" (selepas ini dirujuk sebagai Perjanjian").

2. Di antara terma-terma dan syarat-syarat yang material dalam Perjanjian ini adalah seperti berikut:

   2.1 Defendan ingin menjual harta tanah yang dikenali sebagai PT2227 & 2228, Mukim Krubong dalam Daerah Melaka Tengah, Melaka (selepas ini dirujuk sebagai "Tanah tersebut") dan Plaintif ingin membeli Tanah tersebut;

2.2 harga jualan yang disetujui adalah RM3,325,806.00 (selepas ini dirujuk sebagai "Harga Jualan");

2.3 Harga Jualan akan dibayar mengikut ansuran seperti berikut:

2.3.1 RM676,125.11 dibayar pada tarikh Perjanjian kepada Pejabat Tanah Negeri Melaka sebagai pembayaran premium dan lain-lain bayaran bagi Tanah tersebut;

2.3.2 RM323,874.89 dibayar pada tarikh Perjanjian kepada peguamcara Defendan sebagai "stakeholder" untuk diserahkan kepada Defendan apabila Suratan Hakmilik bagi Tanah tersebut dikeluarkan oleh Pejabat Tanah Negeri Melaka;

2.3.3 RM500,000.00 akan dibayar pada atau sebelum 1 Februari 1997, atas syarat Suratan Hakmilik bagi Tanah tersebut telah dikeluarkan dan Defendan telah mendapat kelulusan dan pihak berkuasa yang berkenaan untuk memindahmilik Tanah tersebut kepada Plaintif;

2.3.4 RM500,000.00 akan dibayar sebelum bulan Mei 1997 atau apabila "project layout plan" diluluskan atau apabila Suratan Hakmilik bagi Tanah tersebut dikeluarkan oleh Pejabat Tanah Negeri Melaka, yang mana lebih lewat;

2.3.5 RM1,325,806.00 akan dibayar pada bulan Jun 1997, atas syarat Suratan Hakmilik untuk Tanah tersebut telah dikeluarkan oleh Pejabat Tanah Negeri Melaka kepada Defendan;

2.3.6 jikalau Defendan gagal atau cuai untuk memindahmilik Tanah tersebut kepada Plaintif apabila Plaintif bersedia untuk membayar baki Harga Jualan, Defendan mesti mengembalikan kepada Plaintif kesemua bayaran yang telah dibuat;

2.3.7 jikalau Defendan gagal atau cuai untuk memindahmilik Tanah tersebut kepada Plaintif apabila Plaintif bersedia untuk membayar baki Harga Jualan, Defendan mesti membayar kepada Plaintif kerugian "liquidated" yang disetujui (agreed liquidated damages) sebanyak 10 peratus daripada Harga Jualan;

2.3.8 jualan dan belian Tanah tersebut diselesaikan pada atau sebelum 30 Jun 1997.

3. Plaintif akan bergantung kepada semua terma-terma dan syarat-syarat Perjanjian ini semasa perbicaraan untuk erti dan kesan yang sepenuhnya.

4. Mengikut terma-terma Perjanjian ini, Plaintif telah membuat bayaran berjumlah RM1,500,000.00.

Butir-Butir

4.1	15 Januari 1997	RM1,000,000.00 dibayar kepada peguamcara Defendan sebagai "stakeholder".
4.2	2 April 1997	RM500,000.00 dibayar kepada peguamcara Defendan atas akujanji Defendan untuk mendapatkan kelulusan dan pihak berkuasa untuk memindahmilik Tanah tersebut kepada Plaintif.

5. Pada atau berhampiran dengan 1 Oktober 1997, di atas permintaan Defendan, Plaintif telah membuat pembayaran tambahan kepada Defendan berjumlah RM300,000.00.

6. Sehingga masa kini, Defendan masih belum mendapat kelulusan daripada pihak berkuasa yang berkenaan untuk memindahmilik Tanah tersebut kepada Plaintif dan dengan itu, transaksi jualan dan belian Tanah tersebut masih belum diselesaikan walaupun masa untuk penyelesaian sudah terlampau.

7. Oleh kerana kegagalan Defendan seperti di atas, pada atau berhampiran 21 Oktober 1998, Plaintif telah memberi notis bertulis kepada Defendan bahawa Perjanjian akan ditamatkan (terminated) jikalau kelulusan untuk memindahmilik masih belum didapatkan pada 25 Oktober 1998 dan dalam notis ini, Plaintif juga telah menuntut pengembalian semua jumlah wang yang telah dibayar kepada Defendan dan pembayaran kerugian liquidated.

8. Demikian, Perjanjian telah pun ditamatkan (terminated) pada 25 Oktober 1998.

9. Sehingga masa kini, Defendan, dengan tanpa sebarang alasan yang sah di sisi undang-undang, telah cuai dan/atau gagal dan/atau enggan mengembalikan jumlah wang sebanyak RM1,800,000.00 atau mana-mana bahagian daripadanya.

10. Defendan, dengan tanpa sebarang alasan yang sah di sisi undang-undang, juga telah cuai dan/atau gagal dan/atau enggan membayar sebarang kerugian liquidated yang telah disetujui berjumlah RM332,580.60 atau mana-mana bahagian daripadanya.

11. Dan Plaintif menuntut:

11.1 jumlah sebanyak RM1,800,000.00 seperti terkandung dalam perenggan 9 di atas;

11.2 jumlah RM332,580.60 seperti terkandung dalam perenggan 10 di atas;

11.3 faedah pada kadar 8% setahun ke atas jumlah-jumlah yang dituntut di atas dan 30 Jun 1997 sehingga tarikh Saman ini difailkan;

11.4 faedah pada kadar 8% setahun ke atas jumlah-jumlah yang dituntut di atas dan tarikh Penghakiman sehingga tarikh pembayaran penuh;

11.5 kos;

11.6.1 apa-apa relief selanjutnya yang Mahkamah Yang Mulia ini memikirkan adil dan saksama.

Where a statement of claim is indorsed on the writ itself, then O. 18 r. 6(5) Rules of the High Court 1980 has no application at all. Order 18 r. 6(5) Rules of the High Court 1980 reads as follows:

> Every pleading of a party must be signed by the party's solicitor or by the party, if he sues or defends in person.

Therefore, the plaintiff's writ herein, indorsed with the statement of claim, has been regularly issued. Deviations, if any, in the plaintiff's writ from that as provided in Form 2 of the Rules of High Court 1980, has not affected the substance or misled the defendant, as to render the writ invalid. The facts and circumstances surrounding the present case must be distinguished from the facts in *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 where the Federal Court held, *inter alia*, that the failure to serve a statement of claim before a judgment in default was entered is a procedural irregularity. Obviously, in that case a detailed statement of claim was not indorsed on the writ nor was a statement of claim served with the writ.

In the present appeal before me, the writ, indorsed with the statement of claim, was served on the defendant on 19 August 1999 and an affidavit of service was filed by one Shahrizal bin Shahdan, affirmed on 14 September 1999 (encl. 3). The submission that the affidavit of service is invalid because of non-compliance with O. 41 r. 1(7) and (8) Rules of the High Court 1980, particularly because of the absence of the title in the jurat, is without merits. Failure of the jurat to bear the title is of very little significance or consequence as the jurat is not a separate document from the affidavit sworn – the jurat forms part of the affidavit and the affidavit is already intituled. In any event, section 71 of the Interpretation Acts 1948 and 1967 provides that whenever forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead shall not invalidate them, save as is otherwise expressly provided for. The Rules of the High Court 1980 do not expressly invalidate non-compliance with any of its forms and in particular form 78 (forms of jurat). Therefore, encl. 3 is a valid affidavit.

In encl. 3, the deponent, the process server of the plaintiff, has exhibited the copy of the writ upon which the defendant has acknowledged receipt of the writ by signing and affixing the seal of the defendant company. That is evidence of valid service on the defendant. Further, in the case of *Pembinaan Masyuli Sdn Bhd v. Mow Seng Housing & Land Development Sdn Bhd* [1998] 3 CLJ 575 Siti Norma Yaakob JCA (as she then was) held:

> Since a corporation conducts its business through its seal, an endorsement of it is evidence that the corporation is a willing and interested party in the transaction that it proposes to partake.

The endorsement of the process server in exh. SS1 in encl. 3 reads:

> 3) Saya Shahrizal bin Sahdan ... telah pada 19.8.99 pukul 4.15 petang telah pergi ke alamat terbaru iaitu di 1/17 Jalan Bacang Jaya 1, Taman Bacang Jaya, Bacang, 75250 Melaka untuk menyerahkan writ saman terhadap Equaltra (M) Sdn Bhd. Saya berjumpa dengan 2 orang perempuan Melayu di alamat tersebut dan mengakui bahawa Syarikat itu adalah Equaltra (M) Sdn Bhd. Beliau menandatangani di belakang sesalinan writ saman yang disertakan ini.

In the circumstances, the clerk/s must have had possession of the defendant's seal and with the authority to use it. That must be the only explanation for the affixing of the seal which can be seen on the copy of the writ, exh. SS1 of encl. 3. However, the defendant seems to contend that the service of the writ was a nullity as it was not served at the registered office of the defendant. In his affidavit (encl. 23A) Mohd Yussof bin Mahadi, the pengarah urusan of the defendant company, says the address at which the writ was served was in fact the temporary business office of the defendant. Mohamed Dzaiddin J (as he then was) in *Lee Boon Tatt & Ors v. Takhdir Trading Sdn Bhd* [1984] 2 MLJ 341 held:

> it was not the legislative intention to limit service only at the registered office. The rule (O. 62 r. 4(1)(b) says if there be more offices than one, then service may be effected at the principal office which should mean the principal place of business of the corporation;

In this particular case, the defendant was obviously not carrying on business at its registered office *ie*, 144 Tingkat Mezzanine Complex Munshi Abdullah at the time of the service of the writ and neither was there the signage of the said defendant company at the said address, according to the process server's affidavit of non-service dated 23 July 1999 (encl. 2). As on 14 July 1999, the defendant was also not carrying on business at 21, Jalan Mangga, Taman M.G.M.B. Bacang as the process server had found the signage of the defendant company to have been removed therefrom and construction works were in

progress at the premises (see encl. 2 paras. 2 and 3). In the circumstances, service of the writ at the defendant's temporary office on 19 August 1999 is regular, effective and valid.

The defendant company did not file any appearance and a certificate of non-appearance was then taken out by the plaintiff and filed on 23 December 1999 (encl. 8). Thereafter, a judgment in default of appearance was entered on 25 February 2000 (encl. 9) for the sum of RM1,800,000 together with RM332,580.60 as liquidated damages interest and costs. On 2 June 2000 the plaintiff issued a writ of seizure and sale and took out a prohibitory order against two immovable properties of the defendant (encls. 14 and 15). In furtherance of the writ of sale and the prohibitory order the plaintiff filed a summons for directions for the sale of the two immovable properties (encl. 17). And, it was only on 25 August 2000 that the defendant's solicitors filed their notice of appointment of solicitors (encl. 20) and, thereafter, applied by summons in chambers dated 20 September 2000 (encl. 23) for leave to enter the memorandum of appearance, set aside the judgment in default of appearance, leave to file a defence, set aside the writ of seizure and sale and prohibitory order, on the grounds that:

a) Writ Saman tidak mempunyai pengindorsan tuntutan atau tidak mempunyai Pernyataan Tuntutan.

b) Writ Saman tidak diserahkan di alamat pejabat berdaftar Defendan.

c) Affidavit perjanjian tidak mempunyai tajuk kepada jurat.

d) Defendan mempunyai pembelaan yang kukuh terhadap tuntutan Plaintif.

e) Lain-lain alasan seperti dinyatakan dalam Afidavit yang difailkan bersama-sama ini.

The learned timbalan pendaftar very correctly dismissed the defendant's application which was supported by the affidavit of Mohd Yussof bin Mahadi affirmed on 19 September 2000 (encl. 23A). There are no merits at all in the defendant's application. The deponent is the managing director of the defendant company. There were no good and cogent reasons advanced for not filing a memorandum of appearance. There can be no serious dispute that the contents of the writ with the indorsed statement of claim had come to the knowledge of the defendant on 19 August 1999 and not as late as August 2000, when the defendant received a copy of the writ of seizure and sale together with a copy of the prohibitory order. Any assertion that the employee of the defendant who had in fact received the writ had not brought the matter to the attention of the defendant until probed by Mohd Yussof, almost a year after the service of the writ, is unconvincing and cannot be accepted by any court as a valid ground to set aside a judgment in default of appearance. There has been

substantial compliance with all rules of procedure when the judgment in default was obtained. There is no incurable defect to render it invalid. Further, the defendant has not been able to show any defence on the merits to the plaintiffs straight forward liquidated claim to the return of the monies paid towards the purchase of the properties in question, under the sale and purchase agreement entered between the plaintiff and defendant dated 20 January 1997. The consent from the State Authority to transfer the properties has not been obtained by the defendant, to date. The plaintiff had given sufficient notice that the agreement would stand terminated if the defendant was unable to obtain the consent, *vide* letter dated 25 September 1998 (exh. P9, encl. 28). The defendant's assertion that the plaintiff has no cause of action, that the action is premature, that the agreement has not been terminated and, that the plaintiff should pay the balance of the full purchase price before the obligation of the defendant to transfer the properties can arise, is without merit. The defendant is unable to obtain the consent from the State Authority to transfer the properties to the plaintiff even after the lapse of such a long time from the date of completion stipulated in the agreement due to no fault of the plaintiff. The purchase price under the agreement for the properties was RM3,325,806. The completion date was before/on 30 June 1997. The plaintiff had already paid a sum RM1,800,000 to the defendant by 1 October 1997. The plaintiff cannot be expected to pay the balance of the purchase monies when there was no prospect of the defendant fulfilling its part of the bargain to obtain the consent to transfer to the plaintiff. In the circumstances, the defendant's appeal against the timbalan pendaftar's decision to set aside the judgment in default of appearance is dismissed with costs.

The defendant's appeal against the timbalan pendaftar's directions given pursuant to the plaintiff's application for directions for sale in relation to the immovable properties siezed in execution of the judgment, is limited to the reserve price fixed by the timbalan pendaftar, as the defendant had not been served with the valuation report. Before me, counsel for the plaintiff consented to have the order on the reserve price set aside and re-fixed by the timbalan pendaftar. Counsel for the defendant agreed and accordingly, by consent, the reserve price fixed by the timbalan pendaftar is set aside and the timbalan pendaftar directed to re-fix the reserve price after both parties have filed and served their respective valuation reports. The timbalan pendaftar is also directed to fix a new auction date, thereafter.

Order accordingly.